IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL EARL CULVERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39725

FILED

JUN 0 5 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Samuel Earl Culverson's post-conviction petition for a writ of habeas corpus.

On January 10, 2001, Culverson was convicted, pursuant to a jury verdict, of one count each of robbery with the use of a deadly weapon, possession of a controlled substance, and possession of a firearm by an ex-felon. The district court sentenced Culverson to serve two consecutive prison terms of 60 to 156 months for robbery with the use of a deadly weapon, a consecutive prison term of 12 to 36 months for possession of a controlled substance, and a consecutive prison term of 24 to 60 months for possession of a firearm by an ex-felon. Culverson filed a direct appeal, and this court affirmed the judgment of conviction.[1]

On January 15, 2002, Culverson filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition, and Culverson filed a reply to the State's opposition. Pursuant to

[1]Culverson v. State, Docket No. 37074 (Order of Affirmance, March 27, 2001).

NRS 34.750 and NRS 34.770, the district court declined to appoint counsel or conduct an evidentiary hearing. On June 3, 2002, the district court denied Culverson's petition. This appeal followed.

In his petition, Culverson raised several claims of ineffective assistance of trial and appellate counsel.[2] To establish ineffective assistance of trial or appellate counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.[3] To establish prejudice with regard to trial counsel, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.[4] To establish prejudice with regard to appellate counsel, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[5]

First, Culverson contended that his trial counsel and appellate counsel were ineffective for failing to challenge the district court's decision not to grant probation for the possession of a controlled substance count. Specifically, Culverson alleged that his counsel should have argued that, under NRS 453.336(2)(a) and NRS 193.130(2)(e), he was entitled to receive

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[2]To the extent that Culverson raised any claims that should have been raised on direct appeal, appellant waived those issues. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[3]Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

[4]Strickland, 466 U.S. at 694.

[5]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

probation on the possession count. We conclude that the district court did not err in rejecting Culverson's claim.

NRS 453.336(2)(a) provides that first-offense or second-offense possession of a schedule I-IV controlled substance is a category E felony. NRS 193.130(2)(e) sets forth the punishment for category E felonies, providing that the district court may impose a prison term of 1 to 4 years and shall suspend the execution of the sentence and grant probation except as provided in NRS 176A.100(1)(b). Pursuant to NRS 176A.100(1)(b)(3), the district court is not required to grant a defendant probation where the defendant has two prior felony convictions. Because Culverson had more than two prior felony convictions, he was not entitled to probation. Accordingly, Culverson failed to demonstrate that his counsel acted deficiently in failing to challenge the district court's decision not to impose probation on the possession count.

Second, Culverson contended that his trial counsel was ineffective for failing to: (1) present evidence and witness testimony with regard to whether the victim had "ownership, control or possession . . . of monies claimed taken"; (2) adequately impeach the victim and uncover evidence to demonstrate that the victim committed perjury; and (3) review the police reports in order to point out contradictions in the testimony of the two police officers about "acts and events at [Culverson's] arrest." We conclude that the district court did not err in rejecting Culverson's claims because they failed for lack of specificity.[6] In the petition, Culverson did not identify the witnesses or documents trial counsel should have presented in support of his claim that he did not take money from the

[6]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

victim and also failed to describe the type of evidence trial counsel should have uncovered and presented to demonstrate that the victim committed perjury. Likewise, Culverson failed to identify the alleged contradictions in the police officers' trial testimony or explain how such contradictions would have changed the result of the trial. Accordingly, the district court did not err in rejecting Culverson's claims regarding trial counsel's investigation and cross-examination of witnesses because they failed for lack of specificity.

Third, Culverson contended that his trial counsel was ineffective in failing to object to the hearsay testimony of Officer Lawson about statements made by Culverson's codefendant, Charles Whaley. Specifically, Culverson contended that the State failed to establish that the declarant Whaley was unavailable and, therefore, Lawson's testimony was inadmissible as hearsay. We conclude that the district court did not err in rejecting Culverson's claim because it is barred by the doctrine of the law of the case.[7]

Although Culverson attempted to reformulate his argument in terms of ineffective assistance of counsel, this court has fully considered the issue of whether Lawson's testimony constituted inadmissible hearsay. In Culverson's direct appeal, this court determined that Lawson's testimony was admissible pursuant to NRS 51.345, the statement against penal interest exception to the hearsay rule. In discussing the admissibility of Lawson's testimony, this court noted that the declarant Whaley was unavailable within the meaning of NRS 51.345 because Whaley was a codefendant set to be tried separately after Culverson's

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[7]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

trial.[8] Alternatively, this court concluded that, even assuming the admission of Lawson's testimony was error, it was harmless. Accordingly, the doctrine of the law of the case prevents relitigation of this claim.[9] Culverson may not avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."[10]

Fourth, Culverson contended that his trial counsel was ineffective for failing to object to jury instruction no. 12,[11] which he alleged contained a legally insufficient and vague definition of reasonable doubt. We conclude that the district court did not err in rejecting Culverson's claim.

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[8]To the extent that Culverson argued that his counsel was ineffective in failing to argue that the admission of Whaley's statement violated his right to confront the witnesses against him, we conclude that the district court did not err in rejecting that claim. The admission of Whaley's statement did not violate Culverson's right to confront the witnesses against him because the statement was reliable and Culverson had an opportunity to cross-examine Officer Lawson. See Barker v. State, 95 Nev. 309, 594 P.2d 719 (1979) (noting that the right to confront witnesses is not violated where statement is reliable and defendant has opportunity to cross-examine the testifying witness regarding the declarant's statement). Accordingly, Culverson failed to demonstrate he was prejudiced by trial counsel's conduct.

[9]See Hall, 91 Nev. at 316, 535 P.2d at 799.

[10]Id.

[11]Jury instruction no. 12 stated: "You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more other persons are also guilty."

Trial counsel was not ineffective for failing to object to jury instruction no. 12 because the reference contained therein to reasonable doubt was further defined in jury instruction 11. Jury instruction no. 11 stated:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after entire comparison and consideration of the evidence, are in such a condition that they can say they feel an abiding conviction of truth of the charge, there is no reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Notably, the reasonable doubt instruction given at Culverson's trial was identical to that set forth in NRS 175.211. Accordingly, Culverson failed to show that his trial counsel was ineffective for failing to object to the reasonable doubt instruction; such an objection would have been overruled since the instruction was proper under Nevada law.[12]

Fifth, Culverson contended that his trial counsel was ineffective for failing to argue there was insufficient evidence to convict him of robbery. Culverson alleged that his robbery conviction should be reversed because, after the trial, the jurors commented that they did not believe the victim's testimony about the robbery, but convicted Culverson anyway because they felt "something happened." We conclude that the district court did not err in rejecting Culverson's claim. Culverson's claim involving the sufficiency of the evidence in support of his robbery

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[12]See Parker v. State, 109 Nev. 383, 849 P.2d 1062 (1993) (recognizing that the district court is required to use reasonable doubt instruction set forth in NRS 175.211).

conviction is barred by the doctrine of the law of the case because this court has previously considered that issue.[13] In fact, in Culverson's direct appeal, this court reviewed the evidence presented at trial and determined that there was sufficient evidence in support of Culverson's robbery conviction. In particular, this court noted that the victim testified that he was robbed and identified Culverson as one of the robbers, and law enforcement apprehended Culverson and another man fleeing the scene with the stolen money. Moreover, we note that, "[a]s a general rule, jurors may not impeach their own verdict."[14] Accordingly, the district court did not err in rejecting Culverson's claim that trial counsel was ineffective for failing to challenge the sufficiency of the evidence in support of his robbery conviction.

Sixth, Culverson contended that his appellate counsel was ineffective because he failed to prepare an adequate appellate brief summarizing the facts of his case and presenting "legal argument regarding multiple defense witnesses known to counsel at [the] time of trial and not presented to the jury." Culverson notes that, in the order of affirmance filed in Culverson's direct appeal, this court stated that appellate counsel's brief was deficient and cautioned him that the failure to comply with the Nevada rules of appellate procedure in the future may result in the imposition of sanctions. We conclude that the district court did not err in rejecting Culverson's claim involving appellate counsel's deficient conduct.

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[13]See Hall, 91 Nev. at 316, 535 P.2d at 799.

[14]Tinch v. State, 113 Nev. 1170, 1174-75, 946 P.2d 1061, 1064 (1997).

Culverson's claim failed for lack of specificity because he neither adequately described the issues appellate counsel failed to raise nor alleged that those issues would have had a reasonable likelihood of success on the merits.[15] Moreover, we note that, although this court cautioned appellate counsel about the quality of his fast track statement, this court further concluded that the fast track statement was sufficient to allow this court to conduct a meaningful review of Culverson's case. Culverson therefore failed to show that he was prejudiced by his appellate counsel's deficient performance in preparing Culverson's appeal.

Having reviewed the record on appeal, we conclude that Culverson is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[17]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

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[15]See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

[16]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[17]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Donald M. Mosley, District Judge
Samuel Earl Culverson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk